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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-187

FRANK P. RINALDI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN J. KELLEY, JR.

1306 Fourth & Walnut Building
36 East Fourth Street
Cincinnati, Ohio 45202
Telephone: 513/241-8829

Attorney for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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The Petitioner, Frank P. Rinaldi, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 27, 1979.

OPINION BELOW

The opinion of the Sixth Circuit is not to be published, but is reproduced herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 27, 1979. This petition is timely filed and jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the Government's admitted violation of The Jencks Act, which prompted the Sixth Circuit to reverse the judgment on Count II, permeated and tainted the entire trial proceedings and thereby deprived petitioner of his Constitutional "due process" rights and warrants a reversal of the Court's judgment on Count I of the Indictment returned against him.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, provides, in pertinent part, as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

18 U.S.C. § 3500

DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES. WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the

examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

26 U.S.C. § 7201

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

shall be fined no more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

On April 10, 1978, the Grand Jury of the United States District Court for the Southern District of Ohio, Western Division, indicted Frank P. Rinaldi, a resident of Cincinnati, Ohio and petitioner herein, charging in two counts that he did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for 1971 and 1972 in violation of 26 U.S.C. § 7201. Count I charged that for the calendar year 1971 petitioner stated that his taxable income was $149,555.00 and that the amount of tax due and owing was $75,637.00 when he knew that his taxable income for said calendar year was $169,123.04 and that the amount of income tax due and owing was $87,775.50; Count II charged that for the calendar year 1972 petitioner stated that his taxable income was $33,301.00 and that the amount of tax due and owing was $9510.00 when he knew that his taxable income for said calendar year was $48,024.24 and that the amount of income tax due and owing was $16,376.21. Therefore, the amount of unpaid tax allegedly owed by the petitioner for 1971 was $12,133.50 and for 1972 was $6,866.21.

On April 20, 1978 petitioner filed a Request for Discovery and Inspection of Specific Material requesting inter alia (R. 7-9) [1]

[1] Record references are to the record filed with the United States Court of Appeals for the Sixth Circuit.

"5. The transcript of the testimony given before the Grand Jury during its investigation and consideration of the subject matter herein by any person, whether or not the government intends to call them at trial."

On April 26, 1978 the government filed its response to the forementioned request, stating that "Many of the requests would fall within the dictates of *Jen[c]ks* v. *United States,* 353 U.S. 657; those that do will be complied with after the particular witness involved has testified on direct examination, 18 U.S.C. 3500." (R. 10-11)

At the trial on June 7, 1978, the government offered the testimony of one George Younes. Younes' testimony pertained to matters in both Counts I and II of the Indictment; i.e. about events which took place in 1972 and concerning arrangements and dealings which the petitioner had with a Mr. Lillie, a government witness in 1971. Furthermore, Mr. Younes was offered not only to establish events which occurred in 1972 but, in addition, to corroborate a pattern of the petitioner's receipt and nonreporting of cash payments, goods and services beginning in 1971 with Mr. Lillie and covering all items that the government "alleged" that petitioner failed to report as income in 1971. After the conclusion of Younes' testimony on direct examination, petitioner requested from the government all Jencks Act material pertaining to Mr. Younes. The Assistant United States Attorney, representing the government, denied that Younes' grand jury testimony had been recorded and petitioner's motion to strike Younes' testimony was overruled by the Court.

The testimony of Lillie and Younes was inexorably tied together. In addition, just as the evidence of Lillie and Younes (relating to Counts I and II of the Indictment) was united, so was the entire case of the prosecution. There was no bifurcation of the evidence, no cleavage between

the two years in question. The evidence was presented to th jury as a whole and the jury was asked to use the evidence of events in one year to corroborate the other. Thus, the testimony of Younes was offered not only to establish events which occurred in 1972, but to corroborate the testimony of Lillie and other government witnesses as to 1971. On June 9, 1978, the jury returned a verdict of guilty as to both counts of the indictment.

On June 29, 1978 petitioner filed a Motion for Judgment of Acquittal or Alternative Motion for a New Trial alleging, along with other grounds, that the District Court erred in admitting the testimony of prosecution witnesses to which objections were made on the ground of abuse of the grand jury process. On July 7, 1978 the government finally turned over to the petitioner Younes' Jencks Act Material. After the motion was argued, the District Court on August 25, 1978 denied petitioner's motion. Thereafter, on September 5, 1978 petitioner was sentenced to five years imprisonment and ordered to pay a fine of $10,000.00 on both Counts I and II, the five year sentences to run concurrently.

REASONS FOR GRANTING THE WRIT

I. The Government's admitted violation of The Jencks Act (18 U.S.C. 3500) permeated and tainted the entire trial proceedings and deprived petitioner of his Constitutional "due process" rights.

Although we do not wish to belabor the Court with an exhaustive recitation of the facts surrounding the government's admitted violation of The Jencks Act, 18 U.S.C. 3500, some of which have been spelled out in the Court of Appeals decision, Appendix A, we submit that it is only against such a backdrop that one can fully appreciate to what extent petitioner's "due process" rights, guaranteed by the Fifth Amendment, United States Constitution, were denied by the government.

Prior to trial, the petitioner on April 20, 1978 filed a Request for Discovery and Inspection of Specific Material requesting, inter alia, (R. 7-9)

> "3. The stenographic recording or transcription of any oral statement made by any person to an agent of the government in connection with the subject matter of the case, whether or not
>
> a. The stenographic recording or transcription is a substantially verbatim recital of the statement; or
>
> b. The statement was recorded contemporaneously with its making; or
>
> c. The statement relates to the proposed subject matter of the direct testimony of the witness at trial.
>
> 4. The statements of persons, or memoranda or recordings of any oral statement of any persons, whether or not made to an agent of the government.

> 5. The transcript of the testimony given before the Grand Jury during its investigation and consideration of the subject matter herein by any persons, whether or not the government intends to call them at trial."

On April 26, 1978 the government filed its response to the forementioned Request denying the existence of any *Brady* [*Brady* v. *Maryland,* 373 U.S. 83 (1963)] material and stating that "Many of the requests would fall within the dictates of *Jen[c]ks* v. *United States,* 353 U.S. 657; those that do will be complied with after the particular witness involved has testified on direct examination, 18 U.S.C. 3500." (R. 10-11) However, at a pretrial meeting held in the Judge's chambers on May 1, 1978, when petitioner's counsel raised the matter of the Jencks Act material, the government at first stated, "If that's requested at trial, it will be produced." (R. 115), but later, after a brief colloquy with the Judge, replied, "We have very little in the way of Jencks material in this case. There's very little, no statements or anything." (R. 116)

During the course of the trial below the defense, on June 6, 1978, at the conclusion of Mr. Lillie's testimony on direct examination, bearing on matters contained in Count I and Count II of the indictment, requested all Jencks Act material pertaining to the witness. (R. 41, 680, 682) However, the government, at a bench conference, when referring to Mr. Lillie's Grand Jury testimony, stated: (R. 681-682)

> "MR. HANLEY: That's not true. The purpose of the Jencks Act is not to get – specifically to get grand jury testimony. It's to have any statements that are in possession of the government, that the government has use of also. Now, we don't have use of his grand jury testimony. I've never seen it.
>
> MR. KELLEY: They had the use of it. They took his testimony.

MR. HANLEY: I don't have the use of it because I don't have it in writing. And since I can't read this type, this thing, [pointing to reporter's machine] I've never seen his grand jury testimony.

THE COURT: Was there a record?

MR. HANLEY: No, there wasn't any record.

THE COURT: Was it taken down?

MR. HANLEY: I'm not even sure that it was ever taken down. I don't know. I don't even know if it was ever recorded, period.

MR. KELLEY: Did you record other witnesses' testimony?

MR. HANLEY: Sure, those that I want.

MR. KELLEY: It's a one-sided proposition, then.

MR. HANLEY: You have the right to cross-examine this witness.

MR. KELLEY: I'm making a motion that his testimony be stricken.

THE COURT: Did you present this matter to the grand jury?

MR. HANLEY: Yes, I did.

THE COURT: You don't remember whether you had a reporter there?

MR. HANLEY: Well, your Honor, it wasn't presented at one time. It would have been several occasions, and I don't always bring a reporter in with me. And whether I had a reporter there when Mr. Lillie was there, I do not recall. I certainly know his testimony has never been recorded. I have never seen a transcript of his testimony, I know that, and no one else has."

The petitioner then objected and moved that Mr. Lillie's testimony be stricken, and the Court overruled said motion.[2] (R. 683)

On June 7, 1978 the petitioner after the conclusion of Mr. Younes' testimony on direct examination, which pertained to matters in Counts I and II of the Indictment, requested the Jencks Act material pertaining to Mr. Younes, and the following colloquy insued at a bench conference:

" (Bench conference)

MR. KELLEY: I asked, your Honor, to address the Court, and I have asked Mr. Hanley for the grand jury statement of the witness, and he has informed me that there is no such transcription.

MR. HANLEY: That's right. I don't even think there was a reporter there, your Honor. My recollection is that with both, with respect to Lillie and Younes, there wasn't even a reporter there.

MR. KELLEY: So as a result of that, once again I want to renew the motion previously made with regard to Mr. Lillie's testimony. I now want to make it in regard to Mr. Younes' testimony, because I think the conclusion is inescapable that, if certain witnesses who appeared before the federal grand jury investigating this matter had their testimony reduced to writing and the U.S. Attorney who is presenting the case and who also conducted the grand jury proceedings had –

THE COURT: Whisper.

MR. KELLEY: – had exercised his option as to whose testimony would be kept and whose wouldn't,

---

[2] Mr. Lillie testified at trial that he thought his testimony had been recorded. (R. 454)

I think that it can be assumed that only the testimony that was favorable to the government was kept and that which would be favorable to the defendant was not taken, and we figure we have been severely prejudiced.

THE COURT: Was there any information that favorable to the defendant?

MR. HANLEY: No, no. If there were, I would have given it to him under Brady, as I'm required to do." (R. 683-684)

The District Court overruled petitioner's motion to strike the testimony of Mr. Younes. (R. 685)

The government did not produce Mr. Younes' grand jury testimony until July 7, 1978 and then only to ward off petitioner's June 29, 1978 Motion for Judgment or Aquittal or Alternative Motion for a New Trial based in essence on the government's abuse of the grand jury function – said motion was denied by the trial judge on August 25, 1978, and an Order to such effect was filed the same day. (R. 102-112) The Court of Appeals succinctly summarized the Trial Court's ruling (A. p. 3):

"In ruling on defendant's post-trial motion for a new trial, the trial judge held that the failure to deliver the statements to the defense was error under the Act. He also found, however, that the default was 'inadvertent' rather than intentional, and further concluded that the error was harmless in view of the slight discrepancies between the testimony before the grand jury and at trial."

On appeal the government finally conceded that it had violated The Jencks Act in the trial court, but relegated said error, which it catagorized as harmless to Count II

of the Indictment. The Court of Appeals, however, when considering the government's defense of harmless error, applied the admonition of this Court that the harmless error rule is to be "strictly applied" where the government has failed to make a disclosure under The Jencks Act. *Goldberg* v. *United States,* 425 U.S. 95, 111 n. 21 (1976). And concluded that while the strict standards of *Goldberg* v. *United States, supra,* when applied to the Younes testimony, preclude a holding of harmless error as to Count II, petitioner's claim of prejudice with respect to Count I is too attenuated to warrant reversal thereunder. (A. p. 4)

(a) The Government's admitted error permeated and tainted the entire trial court proceedings.

In a seeming non sequtur, the Court of Appeals has erroneously isolated the government's error to Count II and concluded that said infection did not prejudice petitioner with respect to Count I. However, the underlying record reveals that Younes' tainted testimony was offered by the government to corroborate a pattern of petitioner's receipt and non-reporting of payments in 1971 as alleged in Count I.

The government's case in both Counts I and II of the instant case was based on a "specific item" theory. And when Internal Revenue Service Agent James Richards, the government's last witness, was on the stand, he identified a computation of what the government claimed was the unreported income of the petitioner for 1971 (Count I) and 1972 (Count II). (R. 388-389, Gov. Exh. 57A)

		1971	1972
1.	Assignment of income from Frank Rinaldi, Jr.	$3,040.00	
2.	Tailored clothing received from Globe Corp. (Hamilton Tailoring Co.)	$7,368.04	
3.	Automobile from Springfield Lincoln Mercury	$1,500.00	$ 750.00
4.	Dental work received from McCabe & Pence	$3,670.00	
5.	Unreported interest on loan to Burton Signer	$ 600.00	
6.	Unreported payments received from George Younes		$9,098.42
7.	Antiques received from George Younes		$4,235.00
8.	Unreported interest received from Norman Lillie	$3,500.00	$ 500.00

In the light cast by Agent Richards' computation, we submit that it is perfectly clear that the government's case against the petitioner on Counts I and II was inseparably linked. While it is, of course, true that for the most part the evidence of Mr. Younes concerned itself with events which occurred in 1972 (Count II), it also related to 1971, since Younes testified concerning the arrangements and dealings which petitioner had with Mr. Lillie. Furthermore, Mr. Younes was offered not only to establish events which occurred in 1972, but, in addition to corroborate a pattern of petitioner's receipt and non-reporting of cash and other material quid pro quos beginning with Mr. Lillie. Thus, the testimony of the government's "star" witnesses for 1971 and 1972 was inexorably tied together.

In addition, just as the evidence of Lillie and Younes was united, so was the government's entire case, and any doubts about that premise are completely negated by the factual import conveyed to the jury by Government Exhibit 57A. We submit that said summary exhibit, reflecting Younes' alleged payments of money and antiques to petitioner in 1972, was intended by the government to convince the jury of petitioner's guilt by using events in the two years in question to support each other.

As we have seen above, there was no bifurcation of the evidence or cleavage between the two years in question. The evidence was presented and argued to the jury as a whole, and the jury was asked to use the evidence of events in one year to corroborate the other. Hence, both counts of the indictment were inseparably bound together – like Siamese twins – each depending on the other for its vitality, especially insofar as the critical element of wilfulness is concerned. And since no one can say that Mr. Younes' tainted testimony was not the very weight that tilted the scales of justice and resulted in petitioner's conviction on Count I – a burden that the Court of Appeals correctly placed on the government, see *United States* v. *Agurs,* 427 U.S. 97, 111 (1976) – the Court of Appeals should have reversed the judgment of the Trial Court as to Count I.

(b) Prosecutorial Misconduct Denied Petitioner His Constitutional Right To A Fair Trial

Although *United States* v. *Agurs, supra,* involved *"Brady"* principles, it contains language, concisely stated, which is fitting to the instant case:

> "For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his clients overriding interest that 'justice shall be done.' He is the 'servant of the law,

> the two-fold aim of which is that guilt shall not escape or innocence suffer.' *Berger* v. *United States,* 295 U.S. 78, 88 x x x." (427 U.S. at 110-111)

and,

> "Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materials exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a *specific and relevant request,* the failure to make any response is seldom, *if ever,* excusable." (427 U.S. at 107) (Emphasis Added) (See United States v. McCrane, 547 F2d 204 (3rd Cir. 1976)

In the case at bar, petitioner on April 20, 1978 requested the government to supply him with its witnesses' grand jury statements, and on April 26, 1978 the government responded through the Assistant United States Attorney who handled this matter before the grand jury and in the trial court, that "Many of the requests would fall within the dictates of *Jen[c]ks* v. *United States,* 353 U.S. 657; those that do will be complied with after the particular witness involved has testified on direct examination. 18 U.S.C. 3500." On May 1, 1978, at a pretrial meeting in the trial judge's chambers, the Assistant United States Attorney first agreed to produce requested Jencks Act material, but shortly thereafter denied that there was any such material. During the course of the trial below, the petitioner on June 7, 1978, at the conclusion of Mr. Younes' testimony on direct examination, bearing on matters contained in Count I and Count II of the indictment, requested the grand jury statement of the witness, and the Assistant United States Attorney replied that there was no such transcription. On

July 7, 1978 the Assistant United States Attorney gave petitioner a copy of Mr. Younes' grand jury testimony. On appeal, the government conceded that it violated the Jencks Act.

As a direct result of the Assistant United States Attorney's misrepresentation of fact, he was (1) able to completely frustrate petitioner's efforts to impeach Mr. Younes' testimony as to the amount of his alleged payments to the petitioner; (2) cloak the fact that Mr. Younes, in his testimony before the grand jury, made no mention whatsoever of giving $4,235.00 worth of antiques to the petitioner; (3) use Mr. Younes' unimpeached testimony in his argument to the trial jury to support the government's position as to both Count I and Count II; and (4) secure a verdict and a judgment against petitioner on both Count I and Count II of the indictment.

Therefore, we submit that the Assistant United States Attorney's actions on behalf of the government denied petitioner his Constitutional right to a fair trial.

CONCLUSION

The question herein presented as to whether the government's admitted violation of the Jencks Act permeated and tainted the entire trial proceedings and thereby deprived petitioner of his Constitutional "due process" rights is of the utmost importance not only to petitioner, but to the public. The Court is respectfully urged to grant certiorari and reverse petitioner's conviction on Count I.

Respectfully submitted,

JOHN J. KELLEY, JR.

1306 Fourth & Walnut Building
36 East Fourth Street
Cincinnati, Ohio 45202
Telephone: 513/241-8829

Attorney for Petitioner

APPENDIX

DO NOT PUBLISH

No. 78-5376

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FRANK P. RINALDI, *Defendant-Appellant.*	APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed August 27, 1979.

Before: CELEBREZZE and ENGEL, Circuit Judges and PECK, Senior Circuit Judge.

PER CURIAM. Defendant Frank P. Rinaldi appeals from his conviction upon two counts of an indictment charging him with wilful evasion of income tax for the years 1971 and 1972, contrary to 26 U.S.C. § 7201 (1976). As grounds for his appeal Rinaldi claims that the district court erred in failing to dismiss the indictment due to impermissible pre-accusatory delay and that the government's evidence was insufficient to sustain the findings of guilt. Finally, he alleges error in the prosecution's failure to reveal the

existence and contents of the recorded grand jury testimony of a government witness, predicating the claim upon the Jencks Act, 18 U.S.C. § 3500 (1976), and, in the alternative, upon a theory of prosecutorial misconduct.

Upon a review of the record, the court is satisfied that the defendant has failed to establish that "the pre-indictment delay . . . caused substantial prejudice to [his] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U.S. 307, 324 (1971) (footnote omitted). *Accord, United States* v. *Lovasco*, 431 U.S. 783, 789-90 (1977). The government's delay in seeking the indictment was not designed to secure an advantage at trial; rather, as Judge Porter properly found, "the delay in this case was a good faith investigatory delay. . . ." Moreover, the defendant has failed to make a showing of substantial prejudice. The court is further of the opinion that the evidence adduced by the government was fully adequate to support the verdicts rendered against the defendant.

The claim with respect to the failure to disclose grand jury testimony presents a more serious challenge. The Jencks Act, 18 U.S.C. § 3500, provides that after a witness called by the United States has testified on direct examination, the defendant upon request is entitled to production of any statement of that witness in the government's possession which relates to the subject matter of the witness' testimony at trial. 18 U.S.C. § 3500 (b). At the trial, George Younes, an antique dealer, testified primarily to events which took place in 1972. Younes claimed he had borrowed approximately $158,000 from Rinaldi in 1972 to finance his antique business. A major issue was whether two money orders and one cashier's check, totaling $9,098.-42, represented interest which Rinaldi received from Younes and had reported in his 1972 tax returns or

whether those moneys were themselves additional but unreported interest. The government claimed that the regular interest on the loans which Rinaldi reported had been paid from time to time in cash, as required by Rinaldi, but that the moneys represented by the checks and money orders were additional interest and not reported. The government also asserted that Rinaldi had failed to report about $4,235 worth of antiques given to him by Younes as additional compensation for the loans, and likewise reportable as income. Although counsel for Rinaldi made a vigorous and timely demand for Jencks Act material, including the grand jury testimony, the prosecution failed to turn over a copy of the grand jury testimony, insisting instead that it had not been transcribed and in all probability had not even been recorded. Further investigation by the government after the trial disclosed that Younes' grand jury testimony had indeed been recorded and a transcript was thereafter furnished.

In ruling on defendant's post-trial motion for a new trial, the trial judge held that the failure to deliver the statements to the defense was error under the Act. He also found, however, that the default was "inadvertent" rather than intentional, and further concluded that the error was harmless in view of the slight discrepancies between the testimony before the grand jury and at trial.

On appeal, the government concedes that it violated the Act. The sole question on appeal, therefore, is whether the error affected the substantial rights of the defendant and requires a reversal of his otherwise valid conviction. In reviewing the impact of the error, we are mindful of the Supreme Court's admonition that the harmless error rule is to be "strictly applied" where the government has failed to make a disclosure under the Jencks Act. *Goldberg* v. *United States*, 425 U.S. 94, 111 n. 21 (1976).

We observe at the outset that a good faith compliance with a court order to provide Jencks Act material ordinarily should involve more than the off-hand and casual treatment evident on the record here. *United States* v. *Pope,* 574 F. 2d 320, 323-26 (6th Cir.), *cert. denied,* —— U.S. ——, 98 S. Ct. 2828, 2856 (1978). In stating that the witness' grand jury testimony had not been recorded, the Assistant United States Attorney represented a fact which reasonable diligence would, and ultimately did, show was untrue. As observed in *United States* v. *Agurs,* 427 U.S. 97, 106 (1976), "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever excusable." The request here was specific and relevant.

Without holding that a failure to disclose must invariably call for reversal, the court is nonetheless of the opinion that, measured by the "strict" standards of *Goldberg* v. *United States, supra,* the government has failed to show that the error in failing to furnish Younes' testimony was harmless. When finally disclosed, it appeared that Younes' grand jury testimony had minimized the amount of cash payments he had made to Rinaldi in 1972, whereas at trial, Younes had testified to numerous cash payments by Rinaldi which in their totality could only be characterized as substantial. While each side drew its own inferences from this testimony and while the parties disagree whether in its confused state, the witness' testimony on the two occasions actually varied, the very fact of the conflict is sufficient to persuade us that a strict scrutiny test precludes a holding of harmless error.

Appellant urges that if count II fails for the reasons cited, so must count I, since Younces' testimony, which dealt with the 1972 tax evasion in count II, nevertheless was also offered "to corroborate a pattern of the receipt and non-

reporting of payments beginning with Mr. Lillie," whose activities were inexorably tied with those of Younes. After a complete review of the entire trial record, the court concludes that any claim of prejudice with respect to count I is altogether too attenuated to warrant the reversal of Rinaldi's conviction thereunder.

The judgment as to count I is affirmed. As to count II, the judgment is reversed and the cause remanded for new trial.

Supreme Court, U. S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

No. 79-487

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK P. RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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No. 79-487

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals incorrectly held that the government's failure to produce Jencks Act material was harmless error as to the first count of the indictment.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of willfully attempting to evade and defeat income taxes for 1971 and 1972, in violation of 26 U.S.C. 7201. The district court sentenced petitioner to concurrent five-year prison terms, and ordered him to pay a $10,000 fine on both counts. The court of appeals reversed petitioner's conviction on the 1972 count but affirmed with respect to the 1971 count (Pet. App. 1a-5a).

The government's proof at trial showed that petitioner owned a sole proprietorship, Rinaldi Investment Company, that was in the business of lending money at high rates of interest to individuals who could not obtain

conventional financing. The government demonstrated that petitioner had failed to report on his tax returns the following items of income that he had received in 1971 and 1972 (Pet. 13-14):

	1971	1972
1. Assignment of income from Frank Rinaldi, Jr.	$3,040.00	
2. Tailored clothing received from Globe Corp. (Hamilton Tailoring Co.)	$7,368.04	
3. Automobile from Springfield Lincoln Mercury	$1,500.00	$750.00
4. Dental work received from McCabe & Pence	$3,670.00	
5. Unreported interest on loan to Burton Signer	$ 600.00	
6. Unreported payments received from George Younes		$9,098.42
7. Antiques received from George Younes		$4,235.00
8. Unreported interest received from Norman Lillie	$3,500.00	$ 500.00

The Jencks Act material at issue is the grand jury testimony of George Younes (who was involved in items 6 and 7 listed above). At the completion of the government's direct examination of Younes, petitioner's counsel requested Younes' grand jury testimony. The

prosecutor responded that he had no transcript of Younes' testimony and that it was his recollection that it had never been recorded (Younes: 46-48).[1] After the trial, the government discovered that Younes' grand jury testimony had in fact been recorded. It ordered the testimony transcribed and thereafter furnished a copy of the transcription to petitioner (Pet. App. 3a).

On petitioner's motion for a new trial, the trial court held that the government's failure to turn over a transcript of Younes' grand jury testimony at the appropriate time violated the Jencks Act. The court found, however, that the violation was harmless error because "the trial testimony and the grand jury testimony of Mr. Younes [were] essentially consistent and * * * the defendant is grasping at straws" (Opinion of trial court, filed August 25, 1978, at 9).[2]

The court of appeals reversed petitioner's conviction as to 1972. It held that the fact that the parties differed as to whether Younes' grand jury testimony was consistent with his trial testimony precluded characterizing the Jencks Act violation as harmless error (Pet. App. 4a). After reviewing the entire trial record, however, the court affirmed petitioner's conviction as to 1971 because any claim of prejudice with respect to that count was "altogether too attenuated" to warrant a reversal (Pet. App. 5a).

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[1] "Younes:" refers to the separately-paginated transcript containing only the testimony of George Younes. "Tr." refers to the remainder of the trial transcript.

[2] We are lodging a copy of the trial court's opinion with the Clerk.

Petitioner contends that the court of appeals erred in holding that his Jencks Act claim for 1971 was "altogether too attenuated." Although Younes' testimony concerned events that occurred in 1972, petitioner argues that it also related to the 1971 charge because Younes testified concerning 1971 dealings between petitioner and government witness Norman Lillie (Pet. 14). But the few brief references to Lillie in Younes' testimony (Younes: 3-7, 48, 60) at most merely confirmed that petitioner had lent money to Lillie, a fact that the defense had readily acknowledged at trial (see, *e.g.*, testimony of defense accountant Mayer comparing petitioner's records of his loans to Lillie with Lillie's records of those loans (Tr. 458-467)).

Petitioner also argues that the 1971 conviction is tainted because "there was no bifurcation of the evidence or cleavage between the two years in question" (Pet. 15). But the trial court gave the jury thorough instructions that it had to consider the evidence on each count separately from the evidence on the other count.[3] It is therefore apparent that even on the unlikely assumption that Younes' testimony could have been fully discredited

[3]The court's instructions were as follows (Tr. 508, 514):

> Failure to comply with the requirements of the Internal Revenue Code for one year is a separate offense from such failure to comply for a different year. Defendant's tax obligation in any one year must be determined separately from his tax obligation in any other year.
>
> * * * * *
>
> The charge as set forth in each count of the indictment constitutes a separate and distinct offense. You must consider each count and the evidence applicable to each count separately, and you must state your findings as to each count uninfluenced by your verdict on the other count. And the defendant may be found guilty or not guilty of one or both of the crimes charged.

by the cross-examination of a defense counsel properly armed with Younes' grand jury transcript, that discreditation would have had no effect on petitioner's conviction for tax evasion in 1971. Accordingly, the court of appeals correctly held that the Jencks Act violation here was harmless error as to the 1971 count of the indictment. See *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976); *United States* v. *Beasley*, 576 F. 2d 626, 633 (5th Cir. 1978), cert. denied, No. 78-5223 (March 5, 1979); *United States* v. *Weidman*, 572 F. 2d 1199, 1207-1208 (7th Cir.), cert. denied, 439 U.S. 821 (1978).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]Petitioner also argues (Pet. 15-17) that the government's failure to turn over Younes' grand jury testimony violated his right to due process, citing this Court's statement in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." But it is apparent from the context of that statement, and from the Court's reliance on *Brady* v. *Maryland*, 373 U.S. 83 (1963), that the Court's reference there was to information tending to exculpate the accused. Here, on the other hand, Younes' grand jury testimony did not exculpate petitioner with respect to either 1971 or 1972. The government's failure to turn over the transcript therefore did not constitute a due process violation.

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